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In the Supreme Court of the United States

OCTOBER TERM, 1966

NOS. 307 AND 308

LOUISIANA PUBLIC SERVICE COMMISSION, PETITIONER

v.

FEDERAL POWER COMMISSION, UNITED GAS PIPE LINE COMPANY AND WILLMUT GAS AND OIL COMPANY

LOUISIANA GAS SERVICE COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, WILLMUT GAS AND OIL COMPANY, AND UNITED GAS PIPE LINE COMPANY

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. No. 308, App. 14–19) is reported at 359 F. 2d 525. The opinion and order of the Federal Power Commission (R. 366–382)[1] are reported at 30 F.P.C. 560; its opinion and order on rehearing (R. 468–475) appear at 31 F.P.C. 1152.

[1] "R." references are to the joint appendix in the court below.

JURISDICTION

The opinion of the court of appeals was entered on April 6, 1966, and its judgment on May 2, 1966. The petitions for writs of certiorari were filed on July 1, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

United Gas Pipe Line Company operates an extensive and integrated interstate gas pipeline system. Sales are made to various communities in Louisiana from lines physically laid in that State. However, the Federal Power Commission found that on occasion a portion of the gas delivered to these communities crosses State lines. The question presented is whether the sales from the integrated system to the Louisiana communities are subject to federal regulation under the Natural Gas Act.

STATUTE INVOLVED

The applicable provisions of the Natural Gas Act are set forth in the Appendix, *infra*, pp. 11–15.

STATEMENT

1. BACKGROUND

Respondent United Gas Pipe Line Company is the traditional wholesale supplier of gas in the Florida Parishes of Louisiana;[2] and most of its sales there have been regulated by the Federal Power Commis-

[2] The Florida Parishes are located in that part of Louisiana lying north of Lake Pontchartrain and east of the Mississippi River (R. 366).

sion (R. 245). Until 1951, part of the gas sold by United in the area was produced in Mississippi.[2] Thereafter, the portion produced in Louisiana increased (R. 368). Accordingly the Commission in 1954 undertook to reexamine the jurisdictional situation. It concluded that United's wholesale sales in the Jackson District (which includes most of the Florida Parishes area) were subject to its regulatory jurisdiction (*United Gas Pipe Line Co.*, 13 F.P.C. 398; R. 370).

On February 5, 1962, petitioner Louisiana Public Service Commission issued an order (R. 156–158; see also R. 7–8) directing United to publish and apply intrastate rates for its wholesale sales of natural gas in the Florida Parishes area in lieu of interstate rates regulated by the Federal Power Commission. United obtained a court order staying the effectiveness of Louisiana's order (R. 159–160) and requested the Federal Power Commission to determine whether it still had jurisdiction over the sales for resale in the area (R. 196–207).[3] United took no position as to which commission had jurisdiction over the sales, but sought relief so that it would not be subjected to penalties because of its obvious inability to comply with the orders of both commissions (R. 198–200).

2. CHARACTERISTICS OF UNITED'S SYSTEM

United is a fully integrated pipeline system that transports and sells natural gas from fields in Louisiana, the federal domain in the Gulf of Mexico off

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[3] Under Section 16 of the Natural Gas Act, the Commission may issue declaratory orders.

Louisiana, Mississippi and elsewhere to industrial customers, interstate pipelines, and local distributors in a number of States (R. 367–370, 374–375; Pet. No. 308, App. 17–18). One interstate line in its system, the Lirette-Mobile Line, originates in Louisiana and primarily transports gas produced within that State (R. 368; Pet. No. 308, App. 18). It passes through the Florida Parishes area—where a small amount of its gas is sold at wholesale—enters Mississippi and terminates at Mobile, Alabama. Another interstate line, the Kosciusko Line, takes gas from offshore fields in the Gulf of Mexico, commingles it with gas produced in Louisiana, proceeds through that State (where a small amount of its gas is sold at wholesale in the Florida Parishes area), and then enters Mississippi (R. 473, 386; Pet. No. 308, App. 18). More than 97 percent of the gas flowing through these lines crosses the Louisiana-Mississippi border (R. 377, n. 12; Pet. No. 308, App. 18). Because these lines are interconnected and their operation fully integrated (R. 473, 367–368, 374–375; Pet. No. 308, App. 17–18), gas at times flows from Mississippi into the Florida Parishes area, reaching communities normally supplied by the Lirette-Mobile Line with gas produced in Louisiana; also, gas from the Kosciusko Line (which, as noted above, originates in the federal domain in the Gulf) regularly flows to some communities in that area and sometimes reaches others which are normally served by the Lirette-Mobile Line (R. 473, 368–389; Pet. No. 308, App. 18). The system's integration improves sta-

bility, dependability, and efficiency of service, particularly in emergencies.

3. THE PROCEEDINGS BELOW

The Commission's hearing examiner found that the Kosciusko Line carried offshore gas commingled with gas produced in Louisiana, and that the Federal Power Commission therefore had jurisdiction over wholesale sales from that line (R. 297). He concluded, however, that sales for resale from the Lirette-Mobile Line were not subject to the Commission's jurisdiction (R. 296–297).

The Commission held that the examiner had erred in distinguishing between the sales he characterized as being made from the Lirette-Mobile Line and those he characterized as being made from the Kosciusko Line (R. 370):

> * * * As the evidence shows, such a dichotomy is illusory and fails to give due recognition to the fully integrated nature of United's interstate pipeline operation.

The Commission concluded (by a 3–2 vote) that it had jurisdiction over all of the sales in question (R. 370, 372–381). In support of its conclusion, it noted the impracticability of a jurisdictional test under which any particular sale would "be subject to federal regulation one day and state regulation the next, depending on the vagaries of a pipeline system's operations * * *" (R. 474).

On review, the court below affirmed the Commission's assertion of jurisdiction over these "sales of natural gas at wholesale by a pipeline company from

its integrated, interstate pipeline system" (Pet. No. 308, App. 14–16), citing *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, and *Federal Power Commission* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (Pet. No. 308, App. 19).

ARGUMENT

As the court below noted, any question of the Commission's jurisdiction to regulate the sales in question is foreclosed by this Court's recent decisions in *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, and *Federal Power Commission* v. *Amerada Petroleum Corp.*, 379 U.S. 687. In those cases pipeline companies agreed with certain producers that all of the gas they purchased from the latter would be earmarked for use exclusively in the pipelines' internal operations, rather than for resale in interstate commerce. In fact, the gas of the designated producers was commingled with other gas in the pipelines. Since, because of this commingling, much of the gas of the producers in question was undoubtedly resold in interstate commerce notwithstanding the earmarking agreement, this Court held that the sales of those producers were within the Commission's regulatory jurisdiction.

Here, too, we submit, the integrated operation of the pipeline system was such that commingling with gas crossing State lines was inevitable; hence, the Commission had jurisdiction of the sales. The gas sold by United in the Florida Parishes may largely have originated in Louisiana; but, because of the integrated nature and operation of United's multi-State

pipeline system, some of that gas unquestionably came from the federal domain or crossed a State boundary. (Statement, *supra,* pp. 3–5.)

The Commission found (Pet. No. 308, App. 17) that prior to 1951 the Florida Parishes "customers were served with gas, a portion of which was produced in Mississippi" (R. 368; see R. 370). Since then "most—*but not all*—of the gas" delivered to certain communities in the area originates in Southern Louisiana (R. 368, emphasis added); "the six communities having short laterals to the Kosciusko line * * * are served with gas, part of which is produced in offshore fields";[4] and "8 of the communities, on specific occasions, have received offshore gas, i.e., gas from a point out of the state" (R. 473). The Commission found further that some communities in the area have "received, at times, gas which flowed back across the Mississippi" boundary, the extent of which "it was not possible to determine with accuracy * * * in view of the automated nature of United's interstate system" (R. 368, 473)—and possibly still receive such out-of-State gas (R. 368–369, 373–374). It observed that it was impossible to estimate the extent of the flow into the Florida Parishes of offshore gas from the Kosciusko line "because United's system is automated and gas automatically flows through its interstate lines depending on the

[4] The offshore fields referred to are three fields on the Continental Shelf in the Gulf of Mexico (shown on the large map, R. 184), all of which, probably, and one of which, certainly, is located in United States territory (R. 282–296).

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pressures in the various lines" (R. 368; see R. 473, n. 7).

Thus, the sales in the Florida Parishes were of part of an undifferentiated volume of wholly in-State gas commingled with gas coming from out of State. Accordingly, the principles established in *Lo-Vaca* and *Amerada* control. Nor is it material that oft-times the gas sold to a Louisiana customer may have been wholly produced within the State. As the Commission noted, it is impossible to determine accurately the flows of gas crossing a State boundary to these communities. A jurisdictional standard that required such determinations would be wholly impracticable. Thus, in *Pennsylvania Water & Power Co.* v. *Federal Power Commission,* 343 U.S. 414, 420, decided under the parallel provisions of the Federal Power Act (16 U.S.C. 824–825r), this Court held that the Commission had jurisdiction of all wholesale sales from an integrated interstate electric system, even though the out-of-State contribution to the energy sold in a particular State varied and was sometimes nil.[5]

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[5] Whether in the absence of an integrated operation of the type involved here the Commission would have basis for asserting jurisdiction over sales of an interstate pipeline in the State of production (on the ground that the gas would in any event be within the stream of interstate commerce from the time of its introduction into the interstate pipeline system) is an issue which, for reasons indicated in the text, need not be reached in this litigation, although we believe that proposition finds substantial support in the *Lo-Vaca* and *Amerada decisions.* See, also, *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U.S. 682; *Deep South Oil Co.* v. *Federal Power Commission,* 247 F. 2d 882 (C.A. 5); *Public Service Commission of Kentucky* v. *Kentucky Natural Gas Corp.,* 119 F. 2d 417 (C.A. 6), affirming *per curiam* 28 F. Supp. 509 (E.D. Ky.).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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RICHARD A. SOLOMON,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,
Federal Power Commission.

AUGUST 1966.

APPENDIX

Section 2 of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717a, provides:

> When used in this act, unless the context otherwise requires—
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> * * * * *
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> (6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.
>
> (7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.
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> * * * * *

Section 4 of the Act, as amended, 15 U.S.C. 717c, provides:

> (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
>
> (b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or

(2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint,

at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Com-

mission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5(a), 15 U.S.C. 717d(a), provides:

> (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

Section 16, 15 U.S.C. 717o provides:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms

used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

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